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## THE POLITICS OF CROSS BORDER DISPUTE RESOLUTION

*Robert K. Rae*

It is always, I think, a good idea to tell people where you are coming from in a personal sense. In my observation of all kinds of law and, certainly, of trade law, where you are depends a lot on where you sit, where you have been, and what your interests are. I grew up both in Canada and in the United States. I spent much of my childhood and schooling days in Washington, D.C. I was Richard Nixon's newspaper boy. I was also Estes Kefauver's newspaper boy and Estes Kefauver was a much better tipper than Richard Nixon. I can tell you that.

I led a political party in Ontario and was involved federally as well as provincially.<sup>1</sup> I became Premier of Ontario during the worst recession since the 1930s. Some people say that was because I was there. Well, it started before I got there, and it ended towards the end of my term. I was defeated in 1995 and retired from politics in 1996. I have since become a member of the law firm of Goodman, Phillips & Vineberg. Since there are so many other lawyers here, I will say no more than that, except that I have been retained for the last year and a half as counsel to the Free Trade Lumber Council. This is a group of companies that are extensively engaged in trying to persuade the Canadian government that we should not be looking to another period of managed trade with respect to softwood lumber. Inevitably and invariably, that brings me in contact with a great many people in the United States. I come at the issue with all the baggage that you see.

I understand that Mr. Blanchard had some things to say on the subject of softwood lumber. Jim is a good friend of mine. He is also in a well-known Washington law firm, which has been retained by the British Columbia Trade Lumber Council. They have a slightly different perspective on life than the Free Trade Lumber Council. I gather he expressed a somewhat different perspective, which is fine. I am sorry he is not here so we could actually have an exchange. I did want to concentrate on the question of softwood lumber sometime during my remarks. It is going to be the most serious trade dispute or trade issue between Canada and the United States in the near future, since it does represent such an enormous volume of trade between our two countries.

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<sup>1</sup> Robert Rae led the New Democratic Party in Ontario from 1982 to 1996.

As someone who has from a very early day been naturally involved in cross border questions, transborder issues, political issues, and the relationship between Canada and the United States, let me make a couple of observations which may be obvious or may not even be true, depending on your point of view.

The first one is that trade is far more important to Canada than it is to the United States. It is important that we always remember in the hard economic sense, access to the United States market is absolutely critical for Canada. We have become even more trade dependent in the last ten years than we were in the 1970s and 1980s. The statistics that people often use are already out of date. I would suspect that well over ninety percent of our exports are now related to the American market. I would think that with respect to Ontario's Gross Domestic Product (GDP), well over half of our GDP now depends on trade. So we can see the level of integration speeding up and becoming even more significant. It is not that trade does not matter to the United States. Obviously, it does. We know that very well. It is just that Canadians need to be instinctively aware of the importance of our access to the United States and the world market as being critical for our standard of living.

The second is the understandable annoyance of Americans with Canadians' preoccupation with being noticed. The outstanding experience that Canadians feel is that of having survived the insufferable arrogance of one empire for a couple of hundred of years, when they did not have a clue who we were nor did they care. I once had a meeting with a British Cabinet Minister, I do not think it was my fault entirely, in which he actually fell asleep in the middle of our meeting. Canadians now face the question, as we enter into a new quasi-imperial relationship, of whether we are going to get noticed in this instance as well. Getting the attention of the United States has constantly been a preoccupation of policy makers in Canada and it would appear that we only get attention when things go wrong or when there is an unusual amount of noise in the attic.

The third is that neither Canada nor the United States are completely consistent with respect to the linkage between what people say and what people do. I am a recovering politician, and I am almost completely cured, but I do not find it surprising, especially in trade matters, that one would see this gap. It is a gap that is shared on both sides of the border. People speak the language and rhetoric of free trade of open markets, of competition; it depends on whose ox is getting gored and what particular industry is being affected, very suddenly one sees practices which are not completely consistent. We all want better access for our goods and services. In Canada, we have a fear of being swamped by those of others. Clearly, in the United

States, there are particular industries and particular interests, which have done a remarkably good job of ensuring that they would not be “swamped” by those of others.

It is fair to say that the Free Trade Agreement and the NAFTA have caused a very significant evolution and a significant change in the economic relationship between Canada and the United States and Mexico. It is wrong, however, to say that prior to the Free Trade Agreement, we did not have any trade between Canada and the United States, and that the Free Trade Agreement itself has somehow caused this remarkably close and integrated relationship between our two economies and countries. The process of integration was already well underway before NAFTA. We have had ways of dealing with trade disputes over a long period of time; none of them were very satisfactory. We have had trade agreements, particularly the Auto Pact.<sup>2</sup> We had historically a number of trade agreements between Canada and the United States and, obviously, we have seen a significant reduction in tariffs at the border over a long period of time.

Public opinion, which is what politicians worry about the most, reflects these mixed emotions. If you were to ask most people on both sides of the border, they would say that they like greater choice. They like the prosperity of open markets. They have come to expect that, and they have no intention of leaving that kind of a world for another model. It is really unthinkable, somehow we would return, certainly in Canada, to some kind of an ocean of heavily managed trade in which the government would attempt to reoccupy or take back certain sectors which have over a period of forty or fifty years been steadily left to the market. At the same time there is a concern, in both the U.S. and Canada, about particular jobs. There is a concern about the environment, and there is concern about identity.

Thomas Friedman’s book<sup>3</sup> talks about this competing desire that we have inside ourselves for efficiency, for productivity, and for the best that technology can bring. We desire continuing and complete access to this world of ever-expanding technological change. At the same time, we have a very deep concern about our own identities and our own cultures and our own values. Often, when Canadians talk about culture, Americans accuse us of reaching deep into the bag of protectionist tricks. Nevertheless, the identity question, the cultural question, is deep and it is real. It is part of what the Seattle phenomenon is all about. I do not pretend to understand

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<sup>2</sup> *Canada-United States Automotive Products Agreement*, 16 Jan. 1965, Can. T.S. 1966 No. 14.

<sup>3</sup> THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* (1999).

completely what the process is all about, or what the demonstrators in Washington are expecting or hoping to achieve.

I want to talk about how these issues get resolved. Then, I would like to talk about the softwood lumber dispute as an example.<sup>4</sup> My general observation would be this: it is very much in Canada's interest, because of its relative size to the United States, because it is a smaller economy, because it is a smaller country, because we are so dependent on trade and on access to markets and, in particular, on access to the United States' market, it is in Canada's interest always to have a comprehensive rules-based system in place that allows us not simply to depend on the kindness or generosity of our trading partner, but rather on the existence of clear rules, which are enforceable, which are transparent, and whose adjudicative value is widely and broadly accepted by parties to the dispute. Everyone in this room knows far better than I do that this was what was promised as the grail that would be achieved when we entered into the negotiations on free trade with the United States. The promise was that while there would be a price in terms of adjustment, while there would be a price in terms of particular jobs and particular industries, at the end of the day we would be able to avoid getting hit by surges in American protectionism or changes in the political mood in the American Congress because we would have a binding mechanism to resolve disputes, and that mechanism would be Canada's best protection.

I should say that as the son of a diplomat, and I have been called the son of many other things, but that, in fact, is what I am. I always was brought up to believe that Canada would most likely achieve that objective, not in a uniquely bi-lateral relationship with the United States, but by insisting on strong multi-lateral rules and multi-lateral institutions and I always follow that logic myself. That is why the comments I heard earlier about the relationship and the connection between the WTO and the NAFTA are so important and that is why it is impossible for us now to talk of an exclusively bi-national relationship or bi-national resolution of disputes between us, because the WTO will enter into those relationships and those disputes every step of the way and particularly when it comes to softwood lumber. I am convinced the WTO is going to enter into the discussion fairly early on with respect to the softwood lumber question.

Softwood lumber is fascinating, not only because I have been working at it recently, and it has helped send my children to University, but because it is the biggest sector working outside the principles of free trade between Canada and the United States. I must say I was deeply heartened by Dick Cunningham's remarks when he said this is going to go on and on and on. I

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<sup>4</sup> In the Matter of Certain Softwood Lumber Products from Canada, ECC-94-1904-1 USA; Memorandum Opinions and Order, 3 Aug. 1994.

appreciate that much more than I can readily say. It is the largest volume of trade between our two countries that now operates outside the principles of free trade, outside the principles of NAFTA, and I would argue, outside the principles of the WTO. If we accept public education, health care, and social services, where there are clear reasons on both sides of the border where these are not seen as entirely marketable commodities, it is the most notable exception. This is an exception that is increasingly problematic.

First of all, it is a very visible area of both of our economies. It is a multi-billion dollar industry that involves the livelihoods of millions of people on both sides of the border. It is key in every part of Canada and the United States. It is not confined to one geographical area, certainly in the case of Canada or in the case of the United States. As a resource sector, as well as a manufacturing sector, there are clear questions about environment, clear questions about sustainability, clear questions about public policy. There are provocative issues of provincial and state autonomy and native rights. There are interests in issues that make this one of the most compelling and most contentious issues of trade between us.

Let us get down to brass tacks. Canada has thirty-five percent of the lumber market in the United States. This is a larger share than we have in virtually any other commodity, certainly any other commodity that is also manufactured in the United States. This market share could well grow. There are internal pressures on the United States to cut less wood on public lands, for example. There has been significant public pressure in the United States. Canada has a smaller economy. We have one-tenth of your population. We have an enormous landmass, and we still have a lot of trees. The impetus for protectionism began in the late 1970s. It is fair to say as long as there has been lumber trade between Canada and the United States, which is close to 200 years, almost from the time of the earliest settlements, people were trading in wood across both sides of the border. It is fair to say that at every juncture, the issue of protectionism has risen again. But the most recent round of protectionism began again in late 1970s. It was related to the decline in American economy at that time.

As everyone here knows, the basic decision was made by a relatively small group of American companies that the most visible, most effective way to keep their prices high and to keep their market share high was to make sure that Canadian products in their market were restricted. There were attempts made through the early 1980s, some of which succeeded politically, though never judicially. This is a subsidy that has never been found by an authoritative public panel. Every time the issue has been taken out of the American political stream, it has been found that there is no massive subsidy of Canadian wood by the Canadian government. Certainly, I can tell you

through my time as Premier, I never once met a leader of a forest products company who came into my office and thanked me for the massive amounts of money that the government of Ontario was giving to his company, the result of which was that his business was becoming so much more profitable. It was kept out of NAFTA discussions.

*Softwood lumber* was sacrificed on the altar of successful negotiations for free trade between Canada and the United States. The only way in which a fast track appeared to be possible was if it was specifically removed from the conference. There is a strong sense that the lumber industry in the United States has tremendous political clout in key states with key senators who are able to put key pressure on the administration. So, we had Softwood Rounds 1, 2 and 3; and we now have a current system of volume controls, which we call quotas. I do not know why this anomaly should be allowed to continue.

When I heard that Mr. Blanchard said that some other deal had to be cooked up in 2001 when this agreement expires, I cannot say that I was surprised to hear that, although I am disappointed. It seems to me that it is really a terrible anomaly at a time when both our countries are pushing forward on greater free trade for the Americas, when we pride ourselves on having achieved this enormously significant breakthrough in terms of the relationship between Canada and the United States, and in terms of the volume of trade which crosses borders without conflict and without disagreements to the advantage of all consumers. It seems so unfortunate that anyone would be contemplating the renewal of what is essentially a closed system that freezes markets, that rewards those who have or who once had a particular market share at a particular time. Within Canada, quotas freeze relations between provinces so that some provinces get more because they had more five or ten or fifteen years ago, and others get less because they did not have as much five or ten or fifteen years ago. Some are out, some are in. If you have quotas, you have a significant advantage in the market share in the United States. If you do not have market share, you do not have any advantage. It is not transparent. In Canada, no one knows which companies have which quota. It is politically unsustainable in Canada. It simply cannot be sustained because of the resentment that grows among those companies that do not have an adequate market share, or an adequate quota. I believe it may be unsustainable in the United States, as well.

There is a new factor in the works with the American economy. A more aggressive consumerism is emerging not simply from small players, but from larger players as well. The most significant change in the economics of the lumber industry in the recent past has been the emergence of large companies, which purchase lumber. There is an enormous difference between the range of small lumber dealers who have historically complained

about the existence of quotas, who are angry about them and do not like them, companies like Home Depot and Lowe's. From my experience, Home Depot is not a small company, and it is going to be just as sophisticated and just as tough about the impact of a cartel-driven quota system as General Motors, Caterpillar, and others are about the possibility of there being steel quotas. The existences of these large consumer interests are going to be a new factor.

The other real factor now in the trading relationship in lumber, of course, is the views and activity of people in the environmental community. It is not clear to me exactly what impact they will have. It is not clear to me exactly what their objective is. One of the ironic things that the environmental community will have to come to terms with is that if their objective is to keep Canadian lumber out of the U.S. market, it will put enormous pressure on American public and private lands and on the American political system regarding where else this lumber is going to come from. . If it is coming from elsewhere around the world, why would anyone believe that environmental practice of those companies are going to be any more pristine, or poor, or subject to approval than those of their nearest trading partner?

Let me conclude by suggesting that our stake as a country is clear. Our stake is in a rules-based outcome and not in another quota deal that I would argue is increasingly unmanageable simply because of the number of interests and parties who aspire to a place at the table. To suggest that it is possible to simply manage another deal, given the pressures and intentions that I have tried to describe, are unrealistic and undesirable.

I talked earlier about the WTO as well as our remedies under the NAFTA. I do not think that Canadian industry should feel that it has no remedy in the event that the usual and predictable propaganda of some of the American industries are allowed to hold sway. We have been through these fights before. We have, by and large, won them. We have lost them at the negotiating table. We tend to win them through the rules-based process and proceed to give them away under the argument that we are gaining some kind of peace.

My view and the view of my clients are that this is wrong. It is simply wrong for us to have the largest volume of trade in a resource sector between these two countries taking place on a system that is not based on any rules, that is not based on any comprehensive and fair assessment of what is subsidy and what is not, what is environmentally acceptable and what is not, but rather is based on the power of one particular political group to impose its remedy and its solutions on others.

The quota-based system was the product not of one cartel, but effectively of two. It took two interests to combine – to impose this agreement on



consumers in the United States. I do not see why it should be sustained by public policy. If we believe that the market should set prices; if we believe that clear environmental rules and practices on both sides of the border are entirely desirable and should be enforced, then let the process take place. Let there be that genuine free and open process, let the two countries agree on what is or is not a subsidy, and how best to protect the environment in both countries. Failing that, let a bi-national panel determine whether or not, indeed, there are subsidies and whether or not, indeed, there are problems with the way in which Canada does business.

The fact that provinces have control over the land base, which is a different way of doing business than in the United States, does not mean that we do not have very transparent and clear rules with respect to taxes that must be paid, fees that must be paid, and rules that must be followed with respect to sustainability. Quite the contrary. Those rules are in place. They are transparent. I would suggest that there are different ownership patterns on both sides of the border. We have different systems in place. If you ask if Ontario environmental rules compare with Louisiana's, if our enforcement ability in the province of Quebec is comparable, and if stumpage rates are as fair and reasonable as they are in states, which are essentially dominated by a small number of privately held companies, my answer is clear: Canada's rules and practices compare favorably. They could be improved. So could those of the United States. If we cannot agree, let some neutral observer determine that. I would not mind. Let the chips fall where they may, if you pardon the expression. Let the issue be determined.

It seems to me that we can never remove politics from trade disputes. It is only natural that people will attempt to create greater certainty through their political institutions and attempt to exercise greater control through their political institutions when faced with change, or when faced with competition. But the whole purpose of trying to create rules, whether it is through NAFTA or through the WTO, is to insist that the political system has to exercise some restraint, and that the policies created by the political system itself have to stand a test that is rules-based and that is not simply based on power or on whim or on the changing vagaries of political and public opinion. Most of us would feel that consumers are more likely to be better served and the economies of both countries are more likely to be better served by this approach than by an approach in which deals are worked out between cartels. My reading of history tells me that deals worked out between cartels do not tend to do the consumers any favor. They do not tend to favor innovation. They do not tend to favor new investment and, frankly, they do not tend to favor the environment. History would tend to point to

that, and that is what will occur with respect to competing issues in the lumber industry between Canada and the United States.

